FILE COPY

Supreme Court, U.S.
FILED
932061 JUL 12 1993
OFFICE OF THE CLERK

No. (1)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DAVID GREEN, EXECUTOR OF THE ESTATE OF
FREDERICK WILLIAM IRVING LUNDY,

Petitioner

vs.

THE UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael R. Werner
Attorney for the Petitioner
c/o Law Firm of Victoria M. Brown
279 Starling Road
Englewood, New Jersey 07631
(201)567-3463

65 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the lower court err in failing to enforce Internal Revenue Code (26 USC Sec. 2033) against the IRS despite the plaintiff's possible waiver or failure to timely or properly object to breach of the same by the IRS?

2. Did the lower court contradict all precedent and/or act outside its discretionary power when it a) confirmed the IRS decision that possession to title in real estate automatically confers value and beneficial interest to a taxpayer and
b) determined value of real property in an estate based upon events occurring after the date of death of the decedent?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the lower courts: United States Court of Appeals for the Third Circuit and the Court of Claims.

TABLE OF CONTENTS

PAGE

Question Presented for Review..... i

List of Parties to the Proceedings in the Court Below..... ii

Table of Contents..... iii

Table of Authorities..... v

Opinions Below..... vi

Statement of Jurisdiction..... vii

Statutes and Regulations Involved x

Statement of Case..... 1-12

Argument..... 13-18

I. THE COURT WAS PATENTLY IN ERROR OF THE IRS CODE SECTION 2033 WHEN IT TAXED DECEDENT FOR PROPERTY WHICH WAS NOT IN ITS ESTATE AT THE TIME OF DECEDENT'S DEATH.

A. THE ONLY THING OF VALUE WHICH DECEDENT HAD IN HIS ESTATE AT THE TIME OF HIS DEATH WAS A CLAIM AND THE RIGHT TO LITIGATE ON THAT CLAIM.

B. EVEN THOUGH LOCAL LAW REGARDING OWNERSHIP IS GENERALLY FOLLOWED, IT SHOULD NOT BE FOLLOWED BY THE COURT WHEN THE RESULTS ARE INCONSISTENT WITH THE INTENT OF FEDERAL LAW.

Conclusion..... 19,20

Appendices..... A-F

TABLE OF AUTHORITIES

CASES

PAGE

Ethlyn Davis v. Comme (US Tax Court 28647-90) which was decided May 13, 1993..... 14,16

Meador's Case (IRS Ruling)., (Feb. 13, 1992), Index Nos 2031-01-00, 2033-01-00, 2053-09-00, Control No. RE-32-259-90..... 7,15,20

Estate of Muriel W. Saunders, deceased, Carolyn S. Wendeler, Executrix, v. Commissioner of the Internal Revenue Service, decided September 28, 1989, T.C. Memo 1989-537; 58 TCM (CCH) 282; TC Mem (P-H) 890537..... 17

CONSTITUTIONAL PROVISIONS

Article XIV of the United States Constitution..... 14

STATUTES

Internal Revenue Code of 1954 (26 U.S.C. 2033) Section 2033..... 3,4,11,13

REGULATIONS

Treasury Regulation Section 20.2033-1(a). viii

REFERENCE TO OPINIONS OF COURTS BELOW

No opinion was rendered by the Court of Appeals. See copy of Decision to enter no opinion annexed hereto as Exhibit B.

STATEMENT OF JURISDICTION

JURISDICTION OF COURTS BELOW:

The Petitioner filed suit in the Claims Court pursuant to 26 USC Sec. 7422 seeking a refund of federal estate tax. The Claims Courts jurisdiction was invoked under 28 USC Section 1491. The US Court of Appeals for the Third Circuit then had jurisdiction in this case pursuant to 28 USC Section 1295 (a)(3).

ENTRY OF JUDGEMENT BELOW:

The Court of Claims rendered summary judgment in favor of the Respondent. There was never a trial on the issues or facts of this case. The summary judgment decision was appealed to the Court of Appeals for the Third Circuit who rendered judgment (which judgment was thereafter entered on April 13, 1993 confirming the decision of the Court of

Claims.

JURISDICTION OF THE SUPREME COURT:

The Supreme Court of the United States has jurisdiction to review this case pursuant to Rule 17.1 (c) of the Supreme Court Rules which states that as to Federal Courts of Appeals, it is a ground for certiorari that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

The federal law which has never been determined by the Supreme Court (nor any other federal court) is whether the IRS has the right to tax "stolen" real property ("stolen" via forged deeds) at its full value in the estate of the victim.

In addition, the Supreme Court of the United States has jurisdiction to review this case pursuant to Rule 17 which permits review

when prevalent case law is not adhered to.

Finally, certiorari is the proper remedy where some right, privilege,or immunity is claimed under federal law, such as question relating to the construction or application of a statute, for example validity of a tax assessment may be question on certiorari.

Hanson v. Denckla (1958), 357 us 235 and Erie R. Co. v Hamilton (1919), 248 US 369.

STATUTE and REGULATION INVOLVED

1. Section 2033 of Title 26 of the United States Code provides that "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."

2. IRS REGULATION RE: 26 USC 2033 - See Appendix D, Section 6.

STATEMENT OF THE CASE

At issue here, is the amount of Estate taxes which the IRS was paid, and if a fraction of such tax should not have been paid. The decedent in this case, Frederick Irving W. Lundy, worked all his life very diligently, starting from a little clam bar in his youth in Sheepshead Bay, New York and developing it into a two thousand seat restaurant which he operated, until his death at the age of 85, in the Sheepshead Bay area of Brooklyn, New York.

Upon his death, the executors reported a gross estate of sixteen million dollars. However, the IRS assessed it at nineteen million dollars, and the Estate paid the IRS a total of ten million dollars in estate taxes plus approximately $150,000 in interest or a total assessment of over ten million dollars.

The main issue between the parties is the different method of valuation of property consisting of twenty-seven parcels of land located in New York State (the "Property"), titles for which, at the time of the decedents death, were no longer in his name. The inheritors, his nieces and nephews, were not aware that the Property had been twice transferred, the second time to a purchaser in good faith and for value, and they filed lawsuits, after his death, to reclaim the Property. During the process, it was discovered that the Property was already transferred twice and was in the name of an unrelated third party.

The first transfer of the Property occurred two months before the decedent's death. The Property was transferred to a corporation named Cruz del Sol, Inc. who in turn transferred the property to two individuals, Wexler and Posner, for alleged consideration of valuable paintings. During the litigation, in a separate criminal

proceeding, two individuals were convicted for fraud in the transfer of the deeds in the first instance; there was no determination of fraud in the transfer of the deeds thereafter. Since there was no determination of fraud upon the second transfer, the Estate settled with the second transferees by paying them $300,000 and accepting from them a twenty-seven Quit Claim Deeds, so that, in effect, the Estate purchased the Property back. The Internal Revenue Service allowed the deduction of $300,000 paid to reclaim the Property but, assessed the Estate for the total value of the Property as if the Property was as saleable as the next because NYS law provides that fraudulent deeds do not transfer title. The IRS then concluded that since title had not transferred, the full value of the Property (less expenses in reacquisition) were to be included in the Estate.

The Internal Revenue Code, 26 USC §2033, provides that only the <u>value</u> of the Property, <u>at the very time of a person's death</u>, should be

assessed for Estate tax purposes (See Appendix D).

The Estate however did not realize any "value" in the "title" to the Property since at the time of decedent's death there had been no determination of fraudulent transfer and a law suit was necessary to quiet title. Thus, all the Estate really had at the time of death was the right to a law suit, a claim, a choice in action. By relying on title as solely determinative of value, the IRS has violated 26 USC §2033 for the following reasons:

1) the IRS failed to focus only on facts known at the time of decedent's death, and at that time there had been no determination of fraud (the claim was settled 2.5 years after the death of decedent when the Estate purchased the Property for $300,000), and

2) the IRS assumed that title gave full value and it is clear that title was obtained only two years later and had no value at time of death. The IRS failed to employ its own beneficial

interest test.

For the foregoing reasons, the beneficiaries, upon realizing that they overpaid the estate taxes, filed a claim for a refund to exclude the Property which was not held in decedent's name at the time of his death. This claim was disallowed by the IRS. The Estate filed a lawsuit with the United States Court of Claims, requesting that the refund be made based on the fact that the Property was not the decedent's to be taxed or in the alternative to include the accounts receivable as a substitution for the land. Such accounts receivable would be the fair market value of the lawsuit.

The Court of Claims had original jurisdiction over this matter pursuant to 28 USC Section 1491. There Court of Claims, noting that there was no dispute as to facts, ruled by summary judgment for the IRS, the Respondents, noting that since title was in the Estate the Estate should be taxed for the Property. The

Court did not address itself to the issue of valuation. The US Court of Appeals for the third Circuit then had jurisdiction to review the appeal of this decision pursuant to 28 USC Section 1295 (a) (3). The US Court of Appeals for the Third Circuit affirmed the decision of the lower court without opinion. See Appendixes A and B.

The Court of Claims ruled that because the forged deed did not transfer the Property, the second transfer which was not forged was also not valid, therefore, the Property, at its full value, less cost of repurchase, remained in the Estate. The Plaintiff, in the oral argument of a summary judgment motion before the Court of Claims, argued that in this case the Property was not saleable and its value still would be worth only as much as the lawsuit. It was then brought to the attention of the lower court Judge, that there is a precedent in the Meador

case[1] where it was ruled that the estate of the thief would be taxed even though the stolen paintings from Germany had been returned to their homeland. The Court of Claims dismissed that precedent, on the ground that paintings were personalty and could be removed, thus possession could be enjoyed, whereas, with "stolen" real property the thief could not enjoy possession. The IRS and the Court of Claims then assumed that possession was full value in itself, without further inquiry into the benefit or value which the possessor could really enjoy eg. the "possessor", the Estate, could not mortgage or sell the Property because title was recorded in another's name, and the Property was vacant land of which a possessor would reap no benefit of possession. In addition, there was no possession by decedent or his Estate as the Property was vacant land. The only real

---

[1] Meador v. IRS (IRS ruling decision made Feb. 13, 1992,Index Nos 2031-01-00, 2033-01-00,2053-09-00, Control No. RE-32-259-90

"possession" in this case would be clear record title which did not exist.

The lower courts were silent of the fact that the Property was to remain forever in the new owner's name if the Estate did not commence litigation. Both lower courts failed to acknowledge that. This leaves one to ponder the outcome had the Estate not sought to quiet title by litigation. Who would the IRS then have taxed? If the Estate had not challenged title to the Property, then in that event, the thief would not have been punished and the third party would have full enjoyment of the Property. Would it be likely or even feasible for the IRS then not to tax the thief?

As mentioned before, the third party did sell the Property by tendering the deeds, evidence that ownership was never clear of record. Indeed, as a net result, the Estate would have been better off if it had not challenged the transfer of the Property as the Estate would have saved litigation costs, the

pre-acquisition costs and seventy-five percent taxes on the declared value of the Property.

The Court of Appeals for the Federal Circuit did not take great interest in the substance of the claim, that is, the fact that the IRS never looked to actual value, beneficial interest, which the Estate had in the Property at the time of decedent's death. The Court of Appeals, at the time of oral argument, made it clear that though the value of the Property may have been improperly determined by the IRS, the Petitioner had not timely or properly or often enough stated this concern over valuation but instead focused on title ownership alone, thus the Estate, in effect waived its right to a reduction in taxes based on wrongful valuation despite the valuation standards set forth in 26 USC §2033. The Court of Appeals for the Federal Circuit ignored the fact that the value had been challenged by Petitioner in summary judgment oral argument before the Court of Claims, and less directly in the Petitioner's argument that

the Estate was willing to include the value of the lawsuit to reclaim title to the Property, which in turn would be the value of the Property with all the liens upon it. Indeed, it was only a difference in semantics, completely out of the control of the beneficiaries, on how the attorneys phrased it.

Now the Petitioner comes to the Supreme Court and in substance is asking this Court to correct this inequity and to direct the IRS to comply with the Internal Revenue Code and its own regulations, and therefore, to tax the Property at its value as known at the time of death, title being only one factor of value and not determinative of the issue. The Petitioner seeks an order of this Court directing the IRS to adhere to Internal Revenue Code and regulations which mandate that only "value" be taxed and the an investigation into the value of the Property at the time of decedent's death be made.

This case is a classic example of how the

court process took on a life of its own and was able to get around the intent of the law through collateral issues of estoppel, waiver etc. so as to avoid the enforcement of a statute clear on its face and which statute the IRS does not dispute. If a determination of value is permitted, then Petitioner will have no problem proving that the value of the Property was very little since there was no one willing to buy it or mortgage it, as title of record was in another's name.

By violation of 26 USC §2033, the IRS overreached its powers and authority which is carefully prescribed by law. No waiver can permit a violation of law by a government agency that clearly oversteps its powers and rights. Because of the IRS overreaching to tax the Property as if title conferred full value and based upon facts occurring after decedent's death, the Estate suffered damages in the amount of $807,228 plus costs and attorney's fees, and the Estate was compelled to borrow money and pay

interest to the IRS for not being able to tender cash. Interest was due on top of the seventy-five percent tax assessment. The Estate had to dispose of the Property and give discounts on the mortgages to salvage part of the inheritance.

If the Supreme Court remands this case for a trial to determine the value of the Property in the Estate at the time of decedent's death, the Estate is prepared to show that such value would be substantially lower than that included in the Estate by the IRS.

REASONS FOR GRANTING WRIT

THIS WRIT SHOULD BE GRANTED BECAUSE TO NOT GRANT THIS WRIT WOULD TO PERMIT THE GOVERNMENT TO OVERSTEP ITS TAXING POWER AND VIOLATE DUE PROCESS OF LAW. IN ADDITION, THE HOLDING OF THE COURT OF CLAIMS, AS AFFIRMED BY THE COURT OF APPEALS, CONTRADICTS EXISTING CASE LAW.

A. VALUATION AT TIME OF DEATH

Section 2033 of Title 26 of the United States Code provides that "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."

A. VALUATION AT TIME OF DEATH

In this case the Respondent, by the IRS, failed to focus valuation as of the date of death of the decedent and instead focused valuation based upon subsequent litigation. Focusing on subsequent litigation for valuation and not on valuation at the time of death

breaches the terms of said IRC code and regulations and thus deprives the taxpayer of due process of law guaranteed by Article XIV of the US Constitution and is a violation of the limits of the taxing power of the US Government as set forth in the Constitution.

A recent decision of the Tax Court which was not available at the time this case was presented to the Court of Claims and the Court of Appeals is the decision of the US Tax Court in the Ethlyn Davis case (US Tax Court 28647-90) which was decided May 13, 1993 (see Appendix C). In this case the IRS again attempted to include a full amount of a reward (in this instance 21 million dollars) in an estate, arising from a law suit ruled upon after the decedent's death. The Tax Court did not permit such action by the IRS and reversed the assessment to a market value of the claim as determined at the time of decedents death, and thereby reduced the IRS tax claim to only $46,176. This $46,176 represented the value of the claim as it would be perceived

at the time of decedent's death. The court noted that the actual outcome of the lawsuit was irrelevant because it would not have been known at the time of decedent's death.

B. VALUATION OF STOLEN PROPERTY

In the Meador case,supra,the IRS, through its rulings determined that stolen personalty was to be taxed to the thief's estate even if the stolen property had been returned. The IRS tries to distinguish stolen personalty from stolen real estate stating that with stolen real estate possession is still maintained even though deeds may have been stolen. The courts failed to recognize that the principals of Cruz Del Sol, Inc (the thieves) did obtain possession and sold the property to Wexler and Posner, who then sold it back to the Estate of $300,000. The IRS then took their argument a step further and stated that title never left the estate because a forged deed does not pass title in NYS. The IRS then concluded, that since the

title and possession were both held by the Petitioner, then the full amount of the Property must be included in the Estate less any expenses incurred as a result of any title disputes.

By such reasoning the IRS duped the judge in the Court of Claims who failed to focus on the fact that only "value" as determined by "beneficial interest" can be included in the Estate. The judge below assumed that title and "possession" (remember that the Property is vacant land so possession has little meaning in regards to benefit) meant full value. Normally title and possession would mean full value in the Estate but not in these circumstances. Because the title had been fraudulently transferred, despite NYS law which holds that title does not change by fraudulent deed, a lawsuit would be and was required to quiet title. Thus, all the Estate had at the time of decedent's death was a right to sue, that is, a choose in action.

That title in itself does not impart full

value (less expenses) is set forth in the case of the Estate of Muriel W. Saunders, deceased, Carolyn S. Wendeler, Executrix, v. Commissioner of the Internal Revenue Service, decided September 28, 1989, T.C. Memo 1989-537; 58 TCM (CCH) 282; TC Mem (P-H) 890537. In this case, the court ruled that because there were possessory rights in another, even though title was held by the Estate, the Estate could not be taxed on the property in question, since title alone confers no value. The Tax Court made it very clear that title alone does not confer benefit or value and would not permit a tax were no benefit or value was proven.

Despite the foregoing case, and others like it, due to semantics or no reason at all, the IRS was permitted in this case to consider title as automatic full value.

The Judgment of the Court of Appeals for the Third Circuit should be reviewed by this Court because the Supreme Court's decision in this case would protect the public from

overreaching state agencies which choose to ignore their own regulations when doing so benefits them and would set precedence, where none exists, as to the treatment of "stolen" real estate in a deceased's estate.

CONCLUSION

The IRS may not circumvent its own regulations in the hope that a taxpayer overlooks their wrongdoing or fails to properly or timely raise objection to their wrongdoing.

Even if the lower court was correct in determining that Petitioner did not timely or properly raise the issue of the violation of the valuation standards set forth in 26 IRC 2033, the lower court should have upheld the Code on its face and ordered the IRS to comply with its own regulations.

Thus the important question of law which this court is asked to rule upon is whether a governmental agency can circumvent Federal statute and its own regulations if the unwitting public does not understand or catch the wrongdoing or does not plead well in the court

of first instance.

It would be unconscionable to permit the IRS to issue rulings which see-saw according to how much money they can make. For instance, in the Meador's estate case the IRS declared the property in question to be in the thief's estate. In this case the IRS declares the stolen property to be in the victim's estate.

Likewise, the Tax Court ruling in the Davis case specifically demonstrates that the Estate was assessed on only approximately $46,000, the value of the law suit at the time of the decedent's death. The IRS was not permitted to look at or mention the fact that subsequent litigation established value at 2.1 million, the final reward.

The Supreme Court is a court of last resort and a court of all legal and equitable powers. Thus, only the Supreme Court can correct the obvious injustice that has been rendered in this case.

APPENDIX

A. Judgment of the Court of Appeals, Third Circuit

B. Opinion of The Court of Appeals, Third Circuit.

C. Judgment of the United States Court of Claims

D. Davis Case Report - Summary of Davis Case

E. Opinions and findings of U. S. Tax Court in case of Estate of Ethlyn Davis, deceased, Don M. Davis, Executor, Petitioner, v. Commissioner of Internal Revenue, Respondent

F. Part of Regulation §20.2033-1 and PH Explanation of Section 2033 of the Internal Revenue Code